Elder v. Perry County Hospital

2006 | Cited 0 times | Court of Appeals of Kentucky | July 21, 2006

SUPREME COURT GRANTED DISCRETIONARY REVIEW: APRIL 11, 2007 (FILE NO. 2006-SC-0775-D)

TO BE PUBLISHED

OPINION

VACATING AND REMANDING

BEFORE: HENRY AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

I. INTRODUCTION

This opinion resolves two interrelated, procedurally tangled appeals involving the proper application of the doctrine of forum non conveniens ("fnc"). In the first appeal, Timothy and Melissa Elder, individually, and as administrators of the estate of Johnathon[2] Elder, appeal from the circuit court's order dismissing the Perry County Hospital ("the Hospital") from a medical malpractice action on fnc grounds. In the second appeal, Norton Enterprises, Inc., d/b/a Alliant Management Services, Inc., ("Norton") appeals from the trial court's later decision to dismiss it from the same underlying medical malpractice action on fnc grounds. Because we believe that the trial court erred by invoking fnc on its own motion, we vacate the Hospital's dismissal. Furthermore, because the trial court erred by granting the Elders' motion to dismiss Norton on fnc grounds, we likewise vacate Norton's dismissal.

II. FACTUAL AND PROCEDURAL HISTORY

The facts essential to resolving these appeals are tragic and uncontested. In February 1999, the Elders took their six-year old son Johnathon to the Hospital because he had a fever and nausea. Although the Elders lived in Hancock County, Kentucky, and the Hospital was in Tell City, Indiana, the Elders took Johnathon to the Hospital because it was only about three miles from their home. According to the Elders, Dr. Uzoma Nwachukwu, the emergency room physician, failed properly to treat Johnathon, causing him to get sicker. Eventually, Johnathon was transported to a hospital in Evansville, Indiana. By then, a bacterial infection had progressed to such a point that the Evansville medical staff was unable to arrest it. Johnathon died.

Two years later, the Elders filed a medical malpractice action in the Jefferson Circuit Court against the Hospital; Dr. Nwachukwu; PhyAmerica, which employed Dr. Nwachukwu and staffed the Hospital's emergency room under contract; and Norton, which managed the Hospital under contract. PhyAmerica eventually filed for bankruptcy and was dismissed from the action. Meanwhile, the Hospital moved to dismiss the claims against it for lack of personal jurisdiction. The Hospital's motion did not seek dismissal on fnc grounds. Nevertheless, after finding that it had personal jurisdiction over the Hospital, the trial court, acting on its own motion, dismissed the Elders' claims against the Hospital, with prejudice, on fnc grounds in August 2004. The trial court later changed the dismissal of the Hospital from "with prejudice" to "without prejudice" but otherwise denied the Elders' motion to vacate. But responding to a later motion from the Elders, the trial court issued an order that stated that the Hospital could not raise the statute of limitations defense if the Elders filed an action against it in another forum. The Elders filed this appeal.[3]

Meanwhile, the trial court issued an order setting a September 2005 trial date on the remaining claims and defendants. In June 2005, Norton moved for summary judgment. Mediation was held, after which the Elders settled their claims against Dr. Nwachukwu; and he was dismissed from the action, leaving Norton as the only defendant in the Kentucky action. While Norton's motion for summary judgment was pending, the Elders moved to dismiss Norton on fnc grounds. In August 2005, over Norton's objection, the trial court granted the Elders' motion to dismiss, without ruling on Norton's pending motion for summary judgment. Furthermore, at the Elders' request, the trial court later issued an order that provided that Norton was prohibited from relying on a statute of limitations defense if the Elders chose to file an action against it in Indiana. Norton then filed this appeal.[4] During the pendency of these appeals, the Elders filed an action in Indiana against the Hospital and Norton.

Due to their similar factual background and legal issues, we have elected to resolve both appeals in this combined opinion.

III. ANALYSIS

We are not presented with the issue of whether the circuit court could exercise personal jurisdiction in the underlying action. Rather, our concern is whether the circuit court properly applied the doctrine of fnc. In order to make that determination, we must first discuss some basic principles.

Although not statutorily recognized, the doctrine of fnc "is clearly part of Kentucky common law."[5] Under that doctrine, a trial court has the power to dismiss a case, even if jurisdiction and venue are proper.[6] The decision of whether to decline to act in a case based on fnc is a matter left to a trial court's discretion, and an appellate court may disturb a trial court's decision only if the trial court's decision represents an abuse of discretion.[7] Bearing those general principles in mind, we now turn to the appeals at hand.

A. Norton's Appeal (Case No. 2005-CA-001843-MR)

We begin by analyzing Norton's appeal because the Elders' overriding objective is for all of their claims to be resolved in one forum, regardless of whether that forum is in Kentucky or Indiana. Indeed, the Elders concede that their appeal would be moot if we affirm the trial court's decision to dismiss Norton on fnc grounds. But we agree with Norton that the trial court erred in dismissing it on fnc grounds, for a variety of reasons.

Inherent in the doctrine of fnc is the availability of an alternate forum.[8] The trial court believed that Indiana would provide the requisite alternate forum. Certainly, because the Hospital is located in Indiana, Norton contracted to operate the Hospital, and the alleged negligence occurred in Indiana, Indiana would have been a proper forum, at least initially. But the Kentucky case had been pending for several years when the trial court invoked fnc to dismiss Norton. Thus, a very real likelihood existed that the operation of the statute of limitations would have precluded Indiana from serving as an alternate forum.

Indeed, Norton contends that Indiana's two-year statute of limitations for wrongful death actions[9] had elapsed when the trial court dismissed it. The parties disagree about whether, under Indiana law, the filing of the action in Kentucky would have tolled the statute of limitations in Indiana.[10] The trial court made no findings whatsoever on whether the Indiana statute of limitations had expired at the time it dismissed Norton, or whether the filing of the Kentucky action tolled the Indiana limitations period.

We conclude, in accordance with the general rule and the persuasive holdings in cases from other states, that a trial court faced with a motion to dismiss on fnc grounds is obligated to consider whether the statute of limitations has run under the law in the alternate forum state.[11] After all, fnc is entirely premised on the availability of an alternate forum; and another forum would not be an alternative if its statute of limitations has expired. Thus, this matter must be remanded so that the trial court can make specific findings as to whether the Indiana statute of limitations has expired. If necessary, the trial court may require the parties to present additional evidence to resolve this issue. If the statute of limitations period in Indiana has elapsed, which seems likely, the trial court must determine if the filing of the action in Kentucky tolled the limitations period under Indiana law. If the limitations period has elapsed and has not been tolled, then the doctrine of fnc is unavailing because no alternate forum would then exist.

The Elders contend that Norton did not preserve the issue for review by virtue of the fact that it never raised the expiration of the statute of limitations in Indiana. But Norton argues, correctly, that it had no reason to raise the expiration of the statute of limitations in Indiana until such time as the trial court issued an order purporting to bar it from raising that defense in any later Indiana action. No transcript or tapes exist of the hearing held on the Elders' motion to bar Norton from asserting the statute of limitations as a defense in Indiana; and the narrative statement of those proceedings

merely states that Norton objected, without specifying a reason. Regardless, however, since this matter is being remanded for further consideration for other reasons, this preservation issue is moot.

In addition, we have grave reservations about the trial court's attempt to bar Norton from raising the statute of limitations in an Indiana court. The trial court did not cite any authority, nor are we aware of any, that would permit it to control the pleadings filed in an Indiana court. However, this issue is moot because we are vacating the fnc-related dismissal of Norton. If, on remand, the Jefferson Circuit Court remains convinced that dismissal due to fnc is proper, we expect it will refrain from attempting to dictate the defenses Norton may raise in an Indiana court.[12]

Additionally, we note that the trial court also failed to consider other factors necessary to a proper resolution of a fnc motion. Although no one factor is determinative and the resolution of an fnc motion depends upon the entire circumstances surrounding a case, a trial court must consider things such as the availability and convenience of witnesses and parties, "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises if view would be appropriate to the action; and all other practical problems that make [the] trial of [a] case easy, expeditious, and inexpensive."[13] There is no indication that the trial court fully considered those factors. Instead, the trial court opined that maintaining an action in Indiana would be more convenient to the plaintiffs because it is nearer their home than is Jefferson County. The Elders admit, correctly, that their convenience is not a factor entitled to significant weight.[14] Furthermore, the trial court did not take into account the length of time the case had been pending before the doctrine of fnc was invoked.[15]

Finally, we agree with Norton that the trial court likely erred in permitting a plaintiff to move successfully for a dismissal on fnc grounds. Neither the trial court nor the parties have cited any authority, nor have we independently located any, permitting a plaintiff to file a motion to dismiss on fnc grounds. In fact, it has long been the rule in Kentucky that a plaintiff's chosen forum should not be disturbed "except for weighty reasons[]" and only if the chosen forum is "seriously inconvenient[.]"[16]

Lest this opinion be misconstrued, however, we are not issuing a permanent, blanket prohibition on a plaintiff moving for an fnc dismissal. We conclude that it is generally impermissible for a plaintiff successfully to obtain a fnc dismissal. And it is possible that, on rare occasions, the circumstances surrounding an action may have drastically changed after the action had been filed such that a plaintiff could meritoriously move for a fnc dismissal. But, in the case at hand, the record does not show this case to be so extraordinary as to merit permitting the Elders voluntarily to abandon their chosen forum.

The decision of whether to dismiss a party on fnc grounds is one within the unique and sound discretion of the trial court as the trial court, not this court, is in the best position to find and assess

the pertinent facts and to control its own docket. However, in the case at hand, the trial court did not properly take into account all of the factors as we have discussed earlier in this opinion. A failure to consider all of the necessary factors involved in resolving a motion to dismiss on fnc grounds is an abuse of discretion.[17] In those situations, an appellate court does not examine the factors. Rather, the matter is remanded to the trial court for further proceedings.[18]

So we vacate the trial court's decision to dismiss Norton on fnc grounds and remand the matter for further analysis. On remand, the trial court shall grant the Elders' fnc motion only if it appears manifestly obvious that the equities heavily weigh in favor of this action proceeding in Indiana, not Kentucky.[19]

B. The Elders' Appeal (Case No. 2005-CA-000591)

Having determined that Norton's fnc dismissal must be remanded to the trial court, we turn our attention to the Elders' appeal. We note at the outset that the Hospital did not appeal the portion of the trial court's order that found that it was subject to the personal jurisdiction of the Kentucky courts. Thus, despite the fact that large portions of its brief address the issue, the issue of personal jurisdiction over the Hospital is not before us.[20] Our only question is whether the trial court properly proceeded on its own motion to dismiss the Hospital on fnc grounds.

We agree with the Elders' contention that, generally, it is preferable to adjudicate in one forum all of a particular plaintiff's claims against all defendants that stem from a common set of facts. However, medical malpractice actions with multiple defendants, such as the case at hand, may sometimes be simultaneously conducted in multiple forums.[21] Thus, we reject the Elders' contention that dismissing their claims against the Hospital while retaining their claims against Norton was erroneous as a matter of law.

It is important to remember that the Hospital did not seek to be dismissed on fnc grounds. Thus, the trial court acted entirely of its own volition when it raised fnc as grounds for dismissal. Although it has not been the subject of an opinion of the appellate courts of Kentucky, the general rule appears to be that a trial court lacks the power on its own motion to dismiss a case on fnc grounds.[22] We believe that general rule to be sound because the convenience of a particular venue, which lies at the heart of the fnc doctrine, is a personal privilege of a defendant; and a defendant is free to waive that privilege.[23] Thus, it is up to each individual defendant to determine if it desires to seek a change of venue; and a trial court, acting on its own motion, errs by declaring a venue to be inconvenient.

Furthermore, it cannot be said that the Hospital somehow raised the prospect of a fnc dismissal when it filed a motion to dismiss for lack of jurisdiction because "[a] motion to dismiss on the ground of forum non conveniens is inconsistent with and necessarily phrased in the alternative to a motion to quash service for lack of jurisdiction . . . because the court, in dismissing a suit on grounds of forum non conveniens, relinquishes jurisdiction it already has over the action, whereas the court, in

quashing service, determines that it never had jurisdiction over the parties and the cause."[24] Accordingly, we find that the trial court erred by dismissing the Hospital on its own motion on fnc grounds.

However, even if the trial court's error were to be deemed cured by its later decision to permit the parties to brief the fnc issue following the Elders' motion to vacate, the result of this appeal would be the same because, as with Norton's appeal, the trial court's written orders dismissing the Hospital do not indicate that it gave due deference to the plaintiff's chosen forum. Furthermore, the trial court heavily emphasized its conclusion that the Elders filed this action in Kentucky because Kentucky had a more favorable medical malpractice law than did Indiana. Regardless of the validity of the trial court's conclusion, the fact that Indiana law may be less favorable to the Elders is an improper consideration since "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the [forum non conveniens] inquiry."[25] Indeed, "[t]he fact that the decision of a case depends on the law of a foreign state is not sufficient to dismiss the action on the ground of forum non conveniens[.]"[26] Thus, the trial court's decision on its own motion to dismiss the Hospital on fnc grounds is vacated; and this matter is remanded for further proceedings consistent with this opinion.

IV. CONCLUSION

For the foregoing reasons, the trial court's decisions to dismiss Norton and the Hospital on fnc grounds are vacated; and these cases are remanded for proceedings consistent with this opinion.

ALL CONCUR.

1. Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

2. Johnathon's name is spelled several different ways throughout the record. For the purposes of this opinion, we will use the spelling from the initial complaint in the underlying action.

3. Case No. 2005-CA-000591-MR.

4. Case No. 2005-CA-001843-MR.

5. Beaven v. McAnulty, 980 S.W.2d 284, 287 (Ky. 1998), superseded by statute on other grounds as noted in Seymour Charter Buslines, Inc. v. Hopper, 111 S.W.3d 387, 389 (Ky. 2003).

6. Id.

7. Williams v. Williams, 611 S.W.2d 807, 809 (Ky.App. 1981).

8. See, e.g., Carter v. Netherton, 302 S.W.2d 382, 384 (Ky. 1957) (holding that under forum non conveniens, an action "will not be dismissed in any event unless an alternative forum is available to the party seeking relief.").

9. See, e.g., Indiana Code § 34-23-1-1.

10. See, e.g., Al-Challah v. Barger Packaging, 820 N.E.2d 670 (Ind.App. 2005) (holding that under Indiana law, the statute of limitations is tolled during the pendency of an action which is filed in the wrong forum, but that no tolling occurs if the previous action was voluntarily dismissed by the plaintiff). As the Elders filed a motion to dismiss Norton on fnc grounds, it appears to us as if the Elders sought a voluntary dismissal of their claims against Norton; but as this issue was not decided by the trial court, we may not issue a definitive opinion thereon. Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989) ("[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court.").

11. See, e.g., 20 Am.Jur.2d Courts § 117 (2005); Satkowiak v. Chesapeake & Ohio Railway Co., 478 N.E.2d 370, 371 (Ill. 1985) ("a dismissal would be improper where there is no other forum or where the statute of limitations has run in the alternate forum and the moving party will not agree to waive the statute"); Tullis v. Georgia-Pacific Corp., 45 S.W.3d 118, 131 (Tex.App. 2000).

12. Similarly, the trial court's order purporting to bar the Hospital from raising the statute of limitations as a defense in Indiana appears to be improper. However, as the Hospital did not appeal from that order, we lack the authority to address that issue vis-àvis the Hospital. See Smith v. Wal-Mart Stores, Inc., 6 S.W.3d 829, 830 (Ky. 1999) (holding that issue was not preserved for review due to party's failure to file protective cross-appeal regarding issue). In any event, however, since the trial court's dismissal of the Hospital on fnc grounds is being vacated, the order purporting to prevent the Hospital from asserting the statute of limitations defense in Indiana would appear to be moot.

13. Roos v. Kentucky Ed. Ass'n., 580 S.W.2d 508, 509 (Ky.App. 1979) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

14. In their main brief in their own appeal, the Elders state that "[h]ad [they] found Indiana to be a more convenient forum, they would have filed their lawsuit there in the first place. The Court is not expected to weigh, in its analysis of [forum non conveniens], the possibility that it can improve the Plaintiffs' travel arrangements by denying them their forum choice."

15. 20 Am.Jur.2d Courts § 125 (2005) ("[d]elay in invoking the doctrine of forum non conveniens may be considered by the court in the exercise of its discretion to grant or to deny a motion based on the doctrine.").

16. Carter, 302 S.W.2d at 384.

17. See, e.g., SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1100) (11th Cir. 2004).

18. See, e.g., nd Iragorri v. United Technologies Corp., 274 F.3d 65 (2 Cir. 2001).

19. See Gulf Oil Corp., 330 U.S. at 508 ("unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

20. Smith, 6 S.W.3d at 830.

21. Copass v. Monroe County Medical Foundation, Inc., 900 S.W.2d 617 (Ky.App. 1995).

22. See 20 Am.Jur.2d Courts § 116 (2005).

23. See, e.g., Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979); Fritsch v. Caudill, 146 S.W.3d 926, 927 (Ky. 2004).

24. 20 Am.Jur.2d Courts § 115 (2005). See also Fritsch, 146 S.W.3d at 927 ("[t]hus, while the concept of venue is important, it does not reach the fundamental level of jurisdiction, a concept whereby the authority of the court to act is at issue.").

25. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981). See also 20 Am.Jur.2d Courts § 119 (2005).

26. 20 Am.Jur.2d Courts § 119 (2005).